

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE FORMAL	)	
COMPLAINT OF GREGORY TERINONI	)	
AGAINST DELMARVA POWER & LIGHT	)	DOCKET NO. 15-1066
COMPANY CONCERNING SERVICE	)	
TERMINATION FOR NON PAYMENT	)	
(Filed June 24, 2015)	)	

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**BRIEF OF PUBLIC SERVICE COMMISSION STAFF REGARDING  
JURISDICTION OF THE PUBLIC SERVICE COMMISSION OVER  
TERMINATION OF SERVICE, TARIFF TAMPERING PROVISIONS, AND  
MEASUREMENT OR ESTIMATION OF UNMETERED ELECTRICITY**

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Dated: October 2, 2015

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## **GENERAL STATEMENT OF STAFF POSITION**

The Staff of the Public Service Commission (“Staff”) submits this brief pursuant to Order No. 8797, dated September 17, 2015, in which the Hearing Examiner solicited briefing from the Parties regarding “whether, and to what extent, the Delaware Public Service Commission ... has jurisdiction in this case” “relating to: a) termination of service; b) Tariff Section XIV entitled Tampering with Company’s Property, including Sub-Sections A and B; and c) despite the Liability for Tampering Tariff, whether calculating the amount of unmetered electricity, when combined with electric rates, results in a ‘billing dispute’ or ‘debt controversy’ over which the Commission does not have jurisdiction.”

As previously stated, Staff takes no position regarding the ultimate outcome of this docket in determining whether the alleged tampering and theft occurred and if so, over what period and for how much in unpaid electric bills. Both Mr. Terinoni and Delmarva Power & Light Company (“Delmarva”) have a significant financial stake in any final decision and continue to rigorously advocate for their respective legal and factual arguments before this tribunal.<sup>1</sup>

Staff, however, does have a keen interest in any interpretation or construction of the Public Service Commission’s (“Commission”) jurisdiction, particularly as it concerns enforcement of and compliance with the Delaware Electric Tariff, as duly adopted by the Commission, which governs all Delmarva contracts for service in Delaware. *See Delaware Electric Tariff, Second Revised Leaf No. 7, available at* <http://www.delmarva.com/uploadedFiles/www.delmarva.com/Pages/my->

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<sup>1</sup> Any discussion by Staff regarding the estimation of unmetered electricity assumes *arguendo* that first there is a finding of tampering or theft by Mr. Terinoni, and such discussion should not be construed as Staff’s view as to whether tampering or theft may have occurred.

business/Choices\_and\_Rates/Delaware/Master%20tariff%20eff%2009-08-2015%20filed%2009-03-15%20Transmission%20rates.pdf [hereinafter “Tariff”].

As such, Staff submits this Brief in support of its position that the Commission has jurisdiction over all issues in this dispute, including termination of service, alleged tampering and theft, and estimation or measurement of unmetered electricity.

## **ARGUMENT**

### **A. The Commission has exclusive jurisdiction over any issues arising from the Tariff, which include termination of service, alleged tampering or theft, and measurement and estimation for unmetered electricity resulting from tampering or theft.**

As both Staff and the Division of the Public Advocate have previously argued, the Commission has “exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of” Title 26 of the Delaware Code. 26 *Del. C.* § 201(a); *Pub. Serv. Comm’n of State of Del. v. Wilmington Suburban Water Corp.*, 467 A.2d 446, 447 (Del. 1983) (“The Commission is a statutorily-created administrative body charged with exclusive original supervision and regulation of all public utilities.”). The Commission may “fix just and reasonable standards, classifications, regulations, practices, measurements or services to be furnished, imposed, observed and followed thereafter by any public utility.” 26 *Del. C.* § 201(a)(1).<sup>2</sup> The Tariff, which incorporates Commission orders

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<sup>2</sup> As has already been adequately briefed by Staff, the Division of the Public Advocate, and Delmarva, 26 *Del. C.* § 201(c)(2), as cited by Mr. Terinoni, does not remove the current dispute from the Commission’s jurisdiction because it applies only to retail customer complaints regarding telecommunications services and is inapplicable to the present case. Even so, as this Brief will further argue, Mr. Terinoni’s dispute exceeds what might be considered a retail

applicable to Delmarva and governs Delmarva's provision of services, is the Commission's "expression of regulatory policy." *Georgia-Pac. Corp. v. Delmarva Power & Light Co.*, 1992 WL 396307, at \*6 (Del. Ch. 1992).

Delaware courts have consistently held that disputes arising under the Tariff are squarely within the Commission's exclusive jurisdiction. *See, e.g., id.* (dispute over customer service classification was a tariff issue under Commission jurisdiction); *Artesian Water Co. v. Cynwyd Club Apartments, Inc.*, 297 A.2d 387, 390 (Del. 1972) (dispute over unpaid bill and termination actually concerned a tariff issue, that is, the quality of the water provided, and thus fell under the Commission's jurisdiction); *Liborio II, L.P. v. Artesian Water Company, Inc.*, 593 A.2d 571, 576 (Del. Sup. Ct. 1990) (Commission has jurisdiction over dispute regarding tax treatment of advance payments received by utility, which was ratified during rate approval proceeding); *Whipple v. Pepco Holdings, Inc.*, 2015 WL 4400039, at \*5 (Del. Super. 2015) (challenge to rates "falls within the PSC's exclusive jurisdiction and, therefore, the claims must be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction").

In the instant case, as the Hearing Examiner's Order No. 8797 acknowledges, several Tariff provisions are implicated, thus placing this controversy squarely within the jurisdiction of the Commission. The impetus for this dispute stems from precisely the three jurisdictional issues identified by the Hearing Examiner: (a) Delmarva's attempt to terminate Mr. Terinoni's service ("termination of service") after the discovery of (b) alleged tampering and theft ("Tariff Section XIV entitled Tampering with Company's Property, including Sub-Sections A and B") and (c) to

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customer complaint or billing dispute and squarely implicates various Tariff issues related to termination of service, alleged tampering or theft, and measurement or estimation of unmetered electricity that are under the Commission's jurisdiction.

recover Delmarva's estimation of unmetered electricity ("calculating the amount of unmetered electricity"). The Tariff addresses all three issues.

The Tariff addresses "termination of service," allowing Delmarva "the right to discontinue the supply of service" "with prior notice" for "non-payment of any bill...." Tariff, First Revised Leaf No. 31. Delaware courts have held that "a question of service termination was within the exclusive purview of the" Commission. *Malawi v. PHI Serv. Co.*, 2012 WL 986751, at \*2 (Del. Com. Pl. Feb. 22, 2012), citing *Georgia-Pacific Corp.*, 1992 WL 396307 at \*6.

Section XIV of the Tariff addresses "TAMPERING WITH COMPANY'S PROPERTY":

#### A. Tampering Expressly Forbidden

No person except a duly authorized representative of the Company shall make any connection or disconnection, either temporary or permanent between the service load of the Customer and the service wires of the Company or set, change, remove or interfere with or make any connections to the Company's meter or other property or any wiring between the Company's meter and the service wires of the Company.

#### B. Liability for Tampering

In the event of the Company's meters or other property being tampered or interfered with, the Customer being supplied through such equipment shall pay the amount which the Company may estimate is due for service used but not registered on the Company's meter, and for the costs of any repairs, replacements required, and any other changes in the Customer's installation as may be required by the Company.

Tariff, First Revised Leaf No. 30. Section B addresses Delmarva's ability to measure or estimate unmetered electricity when tampering occurs: "In the event of the Company's meters or other property being tampered or interfered with, the Customer being supplied through such equipment

shall pay the amount which the Company may estimate is due for service used but not registered on the Company's meter....” Tariff, First Revised Leaf No. 30.<sup>3</sup> Tariff Section IX(B) also addresses Delmarva’s ability to estimate when tampering or theft has occurred:

When a meter is found, upon test made by the Company or the Commission, to have a negative average error, that is when it underregisters or is slow, in excess of two percent (2%), or to be stopped, or in case of a polyphase meter, to be operating with an inactive element, and the error in registration or failure to operate is not attributable to the negligence of the Company, but is *due to some unpredictable cause, such as lightning, tampering or unauthorized overload, the Company shall estimate the proper Delivery Service and combined Electric Supply & Delivery Service charge for the unregistered service by reference to the Customer's consumption during similar normal periods or by such methods as the Commission may authorize or direct.* Except in cases of tampering, theft, inaccessibility to the meter, or unauthorized overload, such an estimate for a slow or stopped meter shall not cover a period of more than three (3) months.

Tariff, Second Revised Leaf No. 22 (emphasis added).

Although there does not appear to be any Delaware case law directly on point regarding the Commission’s jurisdiction over alleged tampering and estimation of unmetered electricity, the holdings of *Georgia-Pac. Corp.*, *Cynwyd Club*, and *Whipple*, as discussed above, direct that tariff issues relating to these issues are within the jurisdiction of the Commission. Furthermore, Section IX(B) clearly directs that when tampering occurs, Delmarva may estimate the unmetered usage “by such methods as the Commission may authorize or direct.” This without question requires that the Commission – and not a court – has jurisdiction over the estimation of

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<sup>3</sup> In addition, in compliance with the Tariff, Delmarva has filed with the Commission various policies and procedures governing estimation of customer bills in a different context – when meters cannot be properly read. Although distinguished slightly from this instant case, where estimation may be applied due to alleged tampering or theft, the existence of these estimation policies suggests – in support of Staff’s position – that estimation and measurement of unmeasured electricity in either context are within the jurisdiction of the Commission.

unmetered usage when tampering has occurred, as is alleged in the instant case, because the Commission must ultimately “direct” or “approve” the method of estimation.

Thus, the central questions of this case – 1) Did the alleged tampering and theft occur? 2) If yes, over what period of time? 3) If yes, what amount of electricity was consumed but not paid for over that period of time? 4) Is there a basis for termination of service? – all implicate the Tariff and place this dispute squarely under the Commission’s jurisdiction.

**B. The measurement and estimation of unmetered electricity arising from tampering is not a “billing dispute” or “debt controversy” for “damages.”**

As the third jurisdictional question posed by the Hearing Examiner in Order No. 8797 implies, Delaware courts have “established a distinction between the supervision and regulation of public utility services and billing controversies between utilities and their customers.” *Malawi v. PHI Serv. Co.*, 2012 WL 986751, at \*2 (Del. Com. Pl. 2012), *citing Artesian Water Co. v. Cynwyd Club Apartments Inc.*, 297 A.2d 387, 389 (Del. 1972). In recognizing this distinction and in disagreement with the position previously taken by the Division of the Public Advocate in its Answering Brief in Opposition to Complainant Gregory Terinoni’s Motion for Partial Summary Judgment, filed September 23, 2015, it is Staff’s position that any calculation, estimation, or measurement arising from alleged tampering or theft is not a simple “billing dispute” or “debt controversy,” but remains a facet of utility regulation within the Commission’s jurisdiction.

It is important in determining this issue that the Hearing Examiner look beyond the labels applied by the Parties to this dispute and instead examine the underlying nature of the



controversy. At least one court has noted in the context of determining the Commission's jurisdiction that a "Court is not bound by [the Parties'] labels ... [or] assertions of lack of jurisdiction... The Court must look behind these contentions, examine the gravamen of [the] action and determine whether there is a claim within the province of the [Commission] or the authority of this Court." *Liborio II, L.P. v. Artesian Water Company, Inc.*, 593 A.2d 571, 574-75 (Del. Sup. Ct. 1990).

**1. Delaware courts have restricted "billing disputes" to controversies over who pays and how much for metered, undisputed usage.**

In the few Delaware court decisions addressing the distinction between a "billing dispute" and a tariff issue, "billing disputes" determined to be outside the Commission's jurisdiction only concerned controversies over the amount owed for metered usage and whether or not bills had been paid and by whom. These "billing disputes" did not involve tariff provisions or estimation of unmetered usage.

In *Malawi v. PHI Service Company*, a customer sought reimbursement from the utility after he had paid the past due bill of another customer at the same residence. The court correctly characterized the claim as a "debt action" or "a billing dispute concerning who should pay [the] delinquent electric bill" and determined that this "type of dispute falls squarely into the realm of billing issues" over which the Commission does not have jurisdiction ... [and] are properly heard in a court of law." *Malawi v. PHI Serv. Co.*, 2012 WL 986751, at \*2-\*4. There was no dispute as to the amount of the bill or the metered usage, only which customer should pay the bill. There was no alleged tampering or theft or need for measurement and estimation of unmetered electricity. The utility's tariff was not implicated. This simple "billing dispute" correctly belonged in court, not before the Commission.

Similarly, in the frequently-cited *Cynwyd Club*, the portion of the dispute reserved for the court outside the Commission’s jurisdiction concerned only the amount of the bill – that is, the “debt controversy” as the court called it – when metered usage had occurred but had not been paid for over a period of time when the customer had duly protested the supply of corrosive water. No tariff provisions would be implicated in the court’s determination of the “debt.” *Artesian Water Co. v. Cynwyd Club Apartments Inc.*, 297 A.2d 387, 389-90. Unlike the instant case, no unmetered usage had occurred, nor was any estimation of unmetered usage involved.

In *Artesian Water Co. v. Smalleys D. V., Inc.*, the court recognized in passing that that the utility had properly sought recovery of debt over disputed water main installation costs in Superior Court while discontinuation of service remained a tariff issue. 1 Del. J. Corp. L. 448, 1975 WL 1955 (Del. Ch.).

## **2. Delaware courts have reserved tariff disputes for the exclusive jurisdiction of the Commission.**

In instances where a utility’s tariff is not implicated, Delaware courts have consistently found that the Commission does not have jurisdiction over cases involving a pure “debt action” or “billing dispute” that concerns what is owed and by whom. In contrast, where the utility’s tariff is implicated, Delaware courts have consistently found that the Commission maintains jurisdiction over such disputes.

In *Georgia-Pacific*, the Court of Chancery held that “no dispute over billing is involved” when the customer sought to switch service classifications and receive a refund for payments made to the utility under the more expensive service classification, finding that the Commission indeed had jurisdiction over most of the customer’s claims. 1992 WL 396307, at \*7. The court

rejected the customer's "overly broad" view of *Cynwyd Club* that all "disputes between a customer and a utility over service are matters that must be adjudicated entirely in the courts." *Id.* Furthermore, the court determined that the Commission had the authority and jurisdiction to order a refund for overpayments made to the utility, if the rate was found to be excessive. "The most equivalent remedy [to the equitable and legal remedies sought by the customer] afforded by the [Commission] is a refund of payments made to the utility, which the [Commission] may order if it finds the utilities rates to be excessive." *Id.* at \*9. The court also distinguishes between a "refund" which the Commission may order and "damages," noting that "to the extent a [Commission] refund does not afford [the customer] full compensation, the [customer] could sue for damages in an appropriate Superior Court action." *Id.* at n.5.

In *Whipple*, the Superior Court recently held that challenges to charges for renewable energy supply appearing on customer bills "do not relate to a billing dispute" unlike *Malawi* and *Cynwyd Club*, but instead "are a challenge to the ... Tariff." *Whipple*, 2015 WL 4400039, at \*4. The court dismissed the claims for lack of subject matter jurisdiction.

**3. The dispute between Delmarva and Mr. Terinoni is analogous to the tariff disputes in *Georgia-Pacific* and *Whipple* and does not involve the type of simple "billing dispute" over metered usage involved in *Malawi* and *Cynwyd Club*.**

The instant case is more akin to the tariff disputes in *Georgia-Pacific* and *Whipple* than the "billing disputes" in *Malawi* and *Artesian*. Here, the utility seeks to recover for unmetered electricity per the provisions of the Tariff that govern alleged tampering and theft and the estimation of unmetered usage. These are clearly tariff issues – like the challenge to the rates in *Whipple* and the refund sought for a change in service classification in *Georgia-Pacific* – under the jurisdiction of the Commission. The calculation of unmetered usage, which will likely

involve the use of appliance usage data and historic rates for electricity, far exceed the scope of issues in a “billing dispute” such as those in *Malawi* and *Cynwyd Club*, where the disputes centered on payment of a bill for undisputed metered use.

**4. Delmarva seeks a recovery from Mr. Terinoni that is most appropriately characterized as a refund or reimbursement under the tariff, rather than damages arising in contract or tort.**

In fact, what is sought by Delmarva in the instant case may be more properly characterized as a refund or reimbursement for unmetered electricity pursuant to the provisions of the Tariff, than damages or a disputed bill. Clearly, claims for damages are outside the jurisdiction of the Commission and belong in a court of law. *See Artesian Water Co. v. Cynwyd Club Apartments, Inc.*, 297 A.2d 387, 389 (Commission has “correctly recognized that it does not sit as a court of law” and has no authority to award damages) (citations and quotations omitted); *Liborio II, L.P. v. Artesian Water Company, Inc.*, 593 A.2d 571, 576 (Del. Sup. Ct. 1990) (Commission has jurisdiction over dispute regarding tax treatment of advance payments received by utility, which was ratified during rate approval proceeding, but “no jurisdiction to consider a breach of contract action” or damages arising therefrom); *Del. Electric Coop. v. Hill*, 1993 WL 138694 (Del. Sup. Ct.) (dispute to determine amount of property damage caused by wrongful termination within jurisdiction of court of law, even though Commission had jurisdiction over utility’s termination of service practices at the time).

However, what Delmarva seeks in the instant case are not damages, but a recovery (or refund or reimbursement, however, the Hearing Examiner may prefer to characterize it) of unmetered electricity under the provisions of the Tariff. The Commission has the authority in enforcing its Tariff, as cited above, to order recovery of unmetered electricity when tampering or

theft has occurred. In other contexts, Delaware courts have agreed that the Commission has the authority within its jurisdiction to determine the amount and require the payment of specific monetary amounts for reimbursements or refunds. In *Georgia-Pacific*, the Court of Chancery held that Commission had the authority and jurisdiction to order a refund of overpayments made to the utility, if the rate was found to be excessive. 1992 WL 396307, at \*9. The court also distinguished between a Commission-ordered “refund” and “damages,” noting that “to the extent a [Commission] refund does not afford [the customer] full compensation, the [customer] could sue for damages in an appropriate Superior Court action.” *Id.* at n.5. In the instant case, the roles are reversed – where the utility seeks recovery from the customer – but the authority and jurisdiction of the Commission to order such a “refund” pursuant to the provisions of its Tariff should be construed in the same way. *See also Bass Properties Inc. v. Public Service Comm’n*, 2011 WL 2791129, at \*7 (Del. Sup. Ct.) (Commission may condition approval of abandonment application upon reimbursement of \$545,327.75 to county government for repairs of wastewater facility).

Thus, the Commission certainly has the authority to order a refund or reimbursement for unmetered usage under a tariff provision, and that is what Delmarva seeks from Mr. Terinoni in the instant case. The Division of the Public Advocate has correctly argued in its Answering Brief that the Commission has no authority to award damages, and certainly, if it is not fully compensated by the Commission in this proceeding, Delmarva may well have to seek a judgment for damages from the appropriate court of law, as the court noted in *Georgia-Pacific*. 1992 WL 396307, at n.5. The measurement and estimation of any unmetered electricity, however, falls within the purview of the Tariff and is squarely within the jurisdiction of the Commission.

**C. The Commission should retain jurisdiction over all aspects of this case, particularly including any estimation of Delmarva's recovery, because it serves the interests of ratepayers and is administratively and judicially efficient.**

The Commission alone – not a court – has the power and authority to direct how a utility allocates any recovery and ensure that such recovery inures to the benefit of ratepayers and not solely as a windfall to the utility's shareholders. The Commission has the exclusive authority and jurisdiction to determine a utility's rates. 26 *Del. C.* §§ 301 *et seq.* The process of setting rates typically occurs every few years and involves a multi-month process to ascertain what price customers should pay for service to cover the utility's costs and provide a reasonable rate of return or profit. It involves a combination of historical data and prospective information to determine what utility costs are allowable and what level of usage is expected. If Delmarva proves that Mr. Terinoni has in fact been using unmetered electricity for some period of time, and possibly during the last twenty years, then the unpaid cost of this electricity would have already been absorbed by all Delmarva ratepayers during previously settled rate cases over possibly the last two decades. Any recovery of damages obtained in court by Delmarva from Mr. Terinoni would be treated in future rate proceedings as a non-recurring event and would inure as a windfall to Delmarva's shareholders rather than compensate the ratepayers who have likely paid higher rates over the years to compensate for the electricity Mr. Terinoni was allegedly consuming without payment.

The Commission, however, has the authority to order Delmarva to allocate any recovery to offset the costs of pursuing its case against Mr. Terinoni. A court does not. The Commission may order any estimated recovery to benefit Delmarva's ratepayers by requiring that Delmarva offset any litigation costs incurred. This would at least provide some benefit to the other

ratepayers who may have been unwittingly subsidizing Mr. Terinoni over the years. In addition to the legal arguments already discussed that support the Commission's jurisdiction over the estimation of any unmetered electricity, the public policy concern to ensure that ratepayers at least get some benefit of any recovery requires that the Commission maintain jurisdiction over all aspects of this case, but particularly over the estimation of unmetered electricity.

Finally, in the interest of efficiency for all parties, but especially Delmarva ratepayers who indirectly pay for the cost of pursuing a case against Mr. Terinoni, the Commission should retain jurisdiction over all aspects of this case, and in particular, should not divest jurisdiction over the estimation of Delmarva's recovery for unmetered electricity to yet another forum as a "billing dispute" over "damages." Delaware courts often consider concerns for judicial and administrative efficiency in resolving complex matters and have noted the state's "interest in providing a forum for efficiently litigating, in a single proceeding, all issues" in a dispute. *See Sternberg v. O'Neil*, 550 A.2d 1105, 1124 (Del. 1988).

The Commission is the third tribunal to hear aspects of Mr. Terinoni's case. Mr. Terinoni and Delmarva have already engaged in significant proceedings in a criminal prosecution in Superior Court and an expedited consideration of a Temporary Restraining Order in the Court of Chancery. Now the parties – along with Staff and the Division of the Public Advocate – are involved in this formal complaint docket before the Commission and its appointed Hearing Examiner. It is unnecessary and inefficient to send part of this dispute to a fourth tribunal, likely a civil proceeding in Superior Court, when this Commission has the jurisdiction and the substantive expertise to determine an estimation of any recovery by Delmarva under its tariff. *See, e.g., Levinson v. Delaware Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1191 (Del. 1992)

(acknowledging “administrative expertise” of agency in resolving complex matters within agency’s substantive expertise).

### **CONCLUSION**

The Commission has exclusive jurisdiction over all aspects of this dispute, and particularly those issues raised by the Hearing Examiner in Order No. 8797. The Commission’s jurisdiction includes any issues arising from the Tariff, which include termination of service, alleged tampering or theft, and measurement and estimation for unmetered electricity resulting from tampering or theft. Although the Commission does not have jurisdiction over pure a “billing dispute” or “debt controversy” for “damages,” the instant case involves the estimation of unmetered usage, which exceeds the scope of a “billing dispute.” Furthermore, Delmarva seeks a recovery from Mr. Terinoni that is most appropriately characterized as a refund or reimbursement under the tariff, rather than damages arising in contract or tort, which remains under the Commission’s jurisdiction. Finally, the Commission should retain jurisdiction over all aspects of this case, particularly including any estimation of Delmarva’s recovery, because it serves the interests of ratepayers and is administratively and judicially efficient.

Respectfully submitted by,

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Dated: October 2, 2015



**BEFORE THE PUBLIC SERVICE COMMISSION  
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(Filed June 24, 2015) )

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**CERTIFICATE OF SERVICE**

I, Brenda R. Mayrack, Esq., counsel for Public Service Commission Staff, do hereby certify that on October 2, 2015, I caused to be served the foregoing BRIEF OF PUBLIC SERVICE COMMISSION STAFF REGARDING JURISDICTION OF THE PUBLIC SERVICE COMMISSION OVER TERMINATION OF SERVICE, TARIFF TAMPERING PROVISIONS, AND MEASUREMENT OR ESTIMATION OF UNMETERED ELECTRICITY by electronic mail on all persons identified below and to be filed with the Delaware Public Service Commission using Delafile.

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